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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 300

SOCONY MOBIL OIL COMPANY, INC.,
Petitioner,

VS.

BROOKLYN UNION GAS COMPANY,
CONSOLIDATED EDISON OF NEW YORK, INC.,
ELIZABETHTOWN CONSOLIDATED GAS COMPANY,
LONG ISLAND LIGHTING COMPANY,
PHILADELPHIA ELECTRIC COMPANY,
PUBLIC SERVICE ELECTRIC & GAS COMPANY,
SOUTH JERSEY GAS COMPANY,
PIEDMONT NATURAL GAS COMPANY, INC.,
THE UNITED GAS IMPROVEMENT COMPANY,
PUBLIC SERVICE CO. OF NORTH CAROLINA, INC.,
DELAWARE POWER & LIGHT COMPANY and
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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August 6, 1962.

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No. .....

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VS.

BROOKLYN UNION GAS COMPANY, ET AL,

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TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on February 14, 1962, (App. 9a) and judgment upon its Petition for Rehearing entered May 21, 1962 (App. 10a) affirming judgment of the United States District Court for the Southern District of Texas, Houston Division, in favor of Brooklyn Union Gas Company, et al, Plaintiffs below, and Transcontinental Gas

Pipe Line Corporation, defendant and cross-plaintiff below,[1] and against Socony Mobil Oil Company, Inc. and the Ohio Oil Company. (R. 779.)[2]

OPINIONS BELOW

The District Court issued a Memorandum on June 29, 1960 (R. 651, App. 12a) 201 F. S. 673, denying Mobil's Motion for Summary Judgment; granting Brooklyn Union's first Motion for Summary Judgment against Mobil; denying Brooklyn Union's second Motion against Transco; and granting Transco's first and second Motions for Summary Judgment; denying efficacy to the reservation of fact made by Mobil.

Thereafter Transco filed a fourth Motion for Summary Judgment, granted in a further memorandum dated November 23, 1960. (R. 754, App. 25a) 201 F. S. 679. The Opinion of the Court of Appeals, styled Socony Mobil Oil Company v. Brooklyn Union Gas Company, et al, 299 F. 2d 692, is contained in the Appendix hereto. (App. 1a)

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[1] All of the parties named in the caption except Delaware Power & Light Company and Transcontinental Gas Pipe Line Corporation were Plaintiffs below in C. A. 12474; Delaware Power & Light Company was Plaintiff in C. A. 12482; Transcontinental Gas Pipe Line Corporation was a Defendant and Cross-Plaintiff in both causes; Socony Mobil Oil Company, Inc. and the Ohio Oil Company were Defendants in both causes. Claims against Socony Mobil Oil Company, Inc. and against the Ohio Oil Company were based upon separate and distinct contracts with each and upon separate facts peculiar to each. Each presented its own Motions and defenses. This Petition deals solely with Socony Mobil Oil Company, Inc.'s contentions and the facts appropriate thereto. In this Petition the parties will be referred to as follows: Plaintiffs, as Brooklyn Union; Transcontinental Gas Pipe Line Corporation, as Transco; this Petitioner, as Mobil; and the Ohio Oil Company, as Ohio.

[2] The record certified from the court below referred to as "R"; the Appendix to this Petition as "App."

JURISDICTION

The judgment of the Court of Appeals was entered February 14, 1962 (R. 843, App. 9a); that denying Mobil a Rehearing, was entered May 21, 1962 (R. 908, App. 10a). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

I.

Whether Section 4 of the Natural Gas Act not only requires that a rate to be legally effective must be filed with the Federal Power Commission, but also renders invalid and unlawful a rate not so filed as required.

II.

Whether the Federal Power Commission, denied power by the Natural Gas Act to fix, make and establish rates, is empowered by Section 16 of that Act to issue a regulation which legislatively enlarges its substantive powers so that it can thereby and thereafter have and exercise the specific power to fix, make and establish rates.

III.

Does failure of a producer to file a sales contract with the Federal Power Commission as a rate schedule, claimed to be subject to regulation under the Natural Gas Act, and failure to make further filings of increased rates provided in such contract, either alone or coupled with a court declared purpose "solely ancillary" to determining the effect of the Court's stay order in another and prior cause, give a court power and jurisdiction to exercise power, primarily and exclusively given by the Natural Gas Act to the Federal Power Commission to determine

lawfulness, i.e., justness and reasonableness, of such contract prices, and direct refund of contract payments in excess of that price adjudged by the Court to be lawful and controlling.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 821, as amended, 15 U.S.C. Sections 717, et seq) are set forth in the Appendix filed herewith (pp. 34a-41a).

STATEMENT

(a) *The Proceedings in the District Court:*

On January 10, 1959, Brooklyn Union, resting jurisdiction generally on the diversity statute and the Act, sued Transco, Mobil and Ohio in the District Court (R. 31) for the difference between 9.7978150¢ per Mcf (R. 37) as "the only lawful rate and charge" and 2.17¢ per Mcf, allegedly paid between February 1, 1955 and January 31, 1957, pursuant to a written sale contract between Magnolia[4] and Transco dated September 12, 1947, for gas from West Gueydan Field, Vermilion Parish, Louisiana, for a term of twenty years. (R. 500, 512, 526-61)

Brooklyn Union plead, inter alia, that *Phillips*[5] subjected the sale to regulation by the Commission; that Commission Orders 174 (19 Fed. Reg. 4534) and 174-A (19 Fed. Reg. 5081) were rate-fixing and rate-making

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[3] On January 12, 1959, Delaware Power & Light Company similarly sued in State Court. Suit was removed (R. 144), and consolidated for trial. (R. 580)

[4] Magnolia Petroleum Company, wholly owned by Mobil, was merged into Mobil effective September 30, 1959. (R. 637)

[5] *Phillips Petroleum Co.* v. *Wisconsin* (June 7, 1954) 347 U. S. 672.

orders setting the only lawful rate collectible by Mobil as that effective on June 7, 1954; that on, and pending appeal from such Orders,[6] the Court of Appeals for the Fifth Circuit issued a stay order, (containing no refund conditions), staying Order 174-A (R. 485); that the appeal was dismissed for want of jurisdiction on June 30, 1956, *Magnolia Petroleum Co. v. F. P. C.*, 236 F. 2d 785, cert. den. 352 U.S. 968; that when the stay was terminated,[7] an obligation to refund arose; that such refund should be distributed by a formula agreement with Transco in a Commission rate proceeding, which Transco alleged it filed, among other reasons, for passing on to its customers, including Brooklyn Union, such purchase prices for gas paid Mobil. Mobil was not a party to the Commission proceeding.

Magnolia held that Orders 174 and 174-A were not adjudicatory or definitive, but were regulations of general applicability which did not and could not adversely affect Mobil except upon the contingency of some future administrative action; did not subject Mobil to Commission jurisdiction; were not self-executory; did not command Mobil to do or refrain from doing anything. (p. 791-2)[8]

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[6] By §19 of the Act, 15 U. S. C. §717r(b). App. 38a.

[7] The stay order was continued pending Petition for Certiorari to this Court (R. 495-6); following denial by this Court, 352 U. S. 968, the Fifth Circuit forwarded its mandate on February 1, 1957, to the Commission. (R. 496-7)

[8] *Magnolia's* holding was consistent with similar decisions of other circuits, none of which held Order 174 or 174-A to be rate-fixing, rate-making, or rate-adjudicatory orders. *See Amerada Petroleum Corp. v. F. P. C.* (10 Cir., 1956) 231 F. 2d 461; *F. P. C. v. Union Producing Co.* (D. C. Cir., 1956) 230 F. 2d 36, cert. den. 351 U. S. 927; *Natural Gas Pipe Line Co. v. Harrington* (5 Cir., 1957) 246 F. 2d 915, cert. den. 356 U. S. 957; *Rel Oil Corp. v. F. P. C.* (5 Cir., 1958) 255 F. 2d 548, cert. den. 358 U. S. 804; *Cities Service Gas Prod. Co. v. F. P. C.* (10 Cir., 1956) 232 F. 2d 726, cert. den. 352 U. S. 911; *Phillips Petroleum Co. v. F. P. C.* (10 Cir., 1958) 258 F. 2d 906.

Mobil, in answer to Brooklyn Union and Transco (R. 282, 326, 368, 412) and in Motion for Summary Judgment (R. 462) plead, inter alia, lack of jurisdiction; the complaint's failure to state a federally cognizable cause of action; that if the sale was subject to Commission regulation,[9] primary jurisdiction of the Commission controlled, so thus the Court had no power to determine, fix, or establish any rate as lawful during the past periods involved, or to determine another rate as unlawful, or to award a judgment for reparations, being the difference between the Court determined lawful rate and the contract stipulated rate collected, whether it purported to act from common law, or by authority of the Act; that the Act abrogated common law causes of action; that the Commission and courts were powerless to inquire into rate lawfulness for past periods; that Commission proceedings between Brooklyn Union and Transco created estoppel, for the Commission, accepting their representations of lawfulness, approved settlement rates designed to recover the purchase price paid Mobil; that recovery by Brooklyn Union and Transco would unjustly enrich each, would constitute unilateral contract destruction; that Transco's payments per the contract were voluntary; and that the claim was barred by the two year statute of limitations of the State of Texas.[10]

The trial court (R. 651, et seq) denied Mobil's Motion for Summary Judgment but granted those of Brooklyn Union and Transco. It held Orders 174 and 174-A were rate orders which made and established June 7, 1954 rates as Mobil's lawful rates, and which prohibited different

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[9] Mobil filed the Transco contract as a rate schedule in February, 1957, after the pertinent times here involved.

[10] If this writ be granted Petitioner reserves the right upon the merits to brief and present its claims respecting estoppel, unjust enrichment, lack of right to restitution, and limitations.

rates from becoming effective or collectible without a filing and 30-day notice provided by said orders and Section 4(d) of the Act. Contract control was ignored.[11] The Court denied invasion of primary jurisdiction of the Commission, declaring it was merely "recognizing and determining" that Order 174-A made the lawful rate and prohibited all other rates as unlawful without Commission permission. Mobil's reserved fact issues were irrelevant, the Court saying it was no concern of Mobil whether Brooklyn Union received any of Mobil's gas or not, since Brooklyn Union asserted Transco's cause of action.[12] (R. 659-60).

Following this decision, Transco filed a fourth Motion for Summary Judgment (R. 666, et seq) seeking recovery against Mobil for those listed in Exhibit 1 (R. 674-6) in the amount opposite each name.[13] None of these were parties. Transco exhibited no authority from any of them to sue on their behalf. The court (R. 754, et seq) granted Transco's Motion.

Judgment was entered against Mobil (R. 779, et seq) in favor of Brooklyn Union for $508,384.58, and in favor of Transco for $30,423.28, with interest from the date of each monthly payment by Transco to Mobil beginning on March 8, 1955. (R. 780)[14]

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[11] The thesis of *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.* (1956) 350 U.S. 332, is that the contract controls subject to modification in the public interest by the Commission.

[12] There was no assignment from Transco to Brooklyn Union. Brooklyn Union and the Court assimilated statements in Transco's pleading to an assignment. (R. 660; 634)

[13] The sums sought range from a low of $22.00 (Bowman, Georgia), to a high of $4,314.36 (Danville, Virginia).

[14] Every one of these payments but the last one on February 28, 1957, were made prior to February 1, 1957, the date on which the trial court held the cause of action *first arose*. (R. 661) All but two were paid more than two years before suit was filed.

(b) *The Judgment of the Court of Appeals.*

On appeal,[15] the Court of Appeals in an opinion by Judge Hutcheson, Chief Judge Tuttle and Judge Jones concurring, affirmed the trial court. The Court of Appeals seemed chiefly preoccupied with finding its stay order issued in *Magnolia*, "not guilty". Mobil never accused it.

Erroneously, the Court stated (App. 3a) Mobil contended that "• • • because of [the] stay order • • • the rates collected [by Mobil] • • • were legal and proper • • • and when • • • the stay order lapsed, the rates collected in the meantime could not be attacked and no refunds could be required • • •". Mobil at no time advanced such a contention.

Mobil contended the stay order was not addressed to, nor affected, rates, nor authorized it to collect any rate; that it only stayed and only declared that it stayed enforcement of Order 174-A, a procedural rule *applicable only after filing with the Commission.*

Mobil's contention that contract rates collected could not be attacked sprang not from the stay order, but solely from the lack of power of both courts below to determine lawfulness of such rates, a power granted by the Act exclusively to the Commission. Its claim that no "refunds" could be required, issued from the Act's express denial to the Commission of power to order reparations, or to consider lawfulness of rates for past periods: powers which the Courts as well are denied; and, also, from the voluntary character of the payments.

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[15] Brooklyn Union and Transco stipulated with Mobil (R. 795) waiving necessity for Mobil to file supersedeas bond under Rule 73(d) F.R.C.P., and agreed that the judgment of the trial court should be stayed and no execution issued on such judgment until final determination by the Court of Appeals or by this Court.

The Court declared that order did not attempt to validate or authorize collection of any rate; (App. 3a, 4a), but inconsistently stated it interfered with collection of rates above the June 7, 1954 level so that upon dissolution, a duty of restitution arose, to restore to Transco and Brooklyn Union amounts collected during pendency of the stay in excess of the June 7 rate. (App. 5a)

The Court reasoned that the contract rates paid "were invalid and unlawful * * * because * * * Section 4 of the statute * * * and Orders Nos. 174 and 174-A * * * require, in order for a rate to be legally effective, that the proposed rate be filed with the Commission, * * * ". Further, without such filing, followed by Commission approval, no such proposed change of rate could be lawfully collected. Proof of unlawfulness was deemed manifest, because filing with the Commission did not occur "until long after" the collections. (App. 3a, 4a)

The Court further declared it could determine merits "by recognizing and determining the lawful rates on June 7, 1954". (App. 4a) It rationalized justification for such exercise of power as being "solely ancillary to determining the effect of the stay orders and their dissolution, * * * " (App. 4a) and of Mobil's failure to file as required.

Repeating the withering ukase of rate invalidity it said Order 174-A and Section 4 of the Act worked from failure to file initially, the Court stated that any rate change provided by the contract was also "forbidden", absent compliance with such filing provisions. (App. 5a)

Curiously, though seeking to justify this invasion of the Commission's primary jurisdiction to "determine" "lawful rates" because "solely ancillary to determining the effect of its stay orders", and so order a money recovery based on such determination; it also confessed its

lack of authority to establish rates or to do "indirectly what the court could not do directly", (App. 6a) while recognizing its stay order did not affect obedience to the Act or compliance with the Regulations. (App. 6a) Realistically evaluated, its decision demonstrates the stay order affected nothing, protected nothing.

It stated the stay order preserved an unlawful status quo, declaring that the status quo "* * * was that until the proposed changes in rates * * * were filed with the Commission, they could not be legally collected, and that when the stay expired all unlawful exactions must be restored." (App. 6a-7a) While reiterating that "at the time the stay orders were issued, the lawful rates established by virtue of the Act and the Regulations of the Commission, were the contract rates of June 7, 1954," (App. 6a) the Court proclaimed that such stay order "did not deal with, or attempt to change, this situation at all."

In Mobil's respectful submission, the stay order could not be both fish and fowl; it could not at the same time affect rates to support a money judgment, and not affect rates to exculpate exercise of power not possessed.

Other portions of the Opinion are not pertinent to the questions presented.

REASONS FOR GRANTING THE WRIT

This is the first case in which this Court has been called upon to consider whether the Federal Power Commission is empowered by Section 16 of the Natural Gas Act to issue a regulation and thereby clothe itself with a power denied it by Congress in the Act. It is also the first case in which this Court has been called upon to consider whether Section 4 of the Act requires that a rate, to be legally effective, must

be filed with the Commission and whether that Section also renders invalid and unlawful a rate not so filed. The court below held that a producer's failure to file a contract with attendant rate invalidity, created a category and area in which the courts could determine lawfulness and adjudicate the consequences without impinging upon power exclusively given the Commission by the Act to determine lawfulness. The decision below squarely presents broad and highly important questions of construction of the Act and the substitution of judicial dictate for the administrative determination stipulated by the statute, contrary to decisions of this Court.

Petitioner accordingly submits that the Court of Appeals has decided important questions of Federal law which have not, but should be, settled by this Court, and has decided them in a way which will not only have serious and substantial effect on the administration of a vital Federal statute, but which opens the door to variation and fluctuation of doctrine from court to court and between court and agency in such fashion as to call for review by this Court.

The Act vested the Commission exclusively as statutory agent of Congress with broad discretion of expert judgment. The powers granted the Commission were denied to the courts. Lawfulness, i.e., justness and reasonableness, was a determination peculiarly within the expertise of the Commission, and that determination was authorized *only prospectively*. The court below did not heed these commands, but instead misconstrued the Act and invaded the primary jurisdiction of the Commission to reach a decision which accorded with its own views of rate lawfulness. Petitioner submits that these matters all furnish additional appropriate reasons for granting the

review requested and a definitive settlement thereof by this Court.

POINT I.

THE COURT OF APPEALS HAS DECIDED ERRONEOUSLY AN ISSUE OF GENERAL IMPORTANCE WHICH THIS COURT HAS NOT SETTLED BUT SHOULD DETERMINE, IN HOLDING THAT SECTION 4 OF THE NATURAL GAS ACT NOT ONLY REQUIRES THAT A RATE TO BE LEGALLY EFFECTIVE MUST BE FILED WITH THE FEDERAL POWER COMMISSION BUT FURTHER PROSCRIBES AS INVALID AND UNLAWFUL A RATE NOT SO FILED.

It is apparent that the Court has misconceived and misconstrued the Act. It declared:

> "* * * the rates paid during the pendency of the stay order were invalid and unlawful * * * because * * * Section 4 * * * requires, in order for a rate to be legally effective, that the proposed rate be filed with the Commission, * * *" (App. 3a)

This mistaken concept is reiterated several times in the course of the Opinion.

Sections 4(c) and 4(d) are the heart of the matter, and are procedural in character only. Section 4(c) requires filing of rates or rate contracts with the Commission. Neither directly nor inferentially does it ordain that validity or legal effectiveness depend upon filing. It requires filing alone, nothing more. Failure to file does not leave the Commission powerless; it can enforce filing.

Equally, Section 4(d), dealing with notice of changes in rate, is expressly applicable only to a rate schedule or contract *already on file* as an initial rate under Section

4(c), or as changed by a prior filing. The language is:

> "• • • no change shall be made by any natural-gas company in any *such* rate, charge • • • or contract relating thereto, except after thirty days' notice to the Commission and to the public."[16]

The antecedent of "such" is the rate already on file by Section 4(c) as an initial rate, or a rate theretofore changed but on file. Section 4(d) provides for notice only and contains no grant of power either to the Commission or to any independent producer subject to its regulation.

In *Mobile* this Court viewed Sections 4(c) and 4(d) as notice sections only, the first addressed to all rates and contracts, the second to changes in "previously filed" rates or contracts (p. 338). Such requirements of filing were necessary to implement the rate review powers of Sections 4(e) and 5(a). (p. 341-2). Since contracts control relationships between the parties, filing permitted Commission supervision of individual contracts, which furnished protection of the public interest (p. 339)

United Gas Pipe Line Company v. *Memphis Light, Gas & Water Division* (1958), 358 U.S. 103, holds the same view of Sections 4(c) and 4(d) (p. 111). Summing up, this Court said:

> "United, like the seller of an unregulated commodity, has the right in the first instance to change its rates as it will, unless it has undertaken by contract not to do so. The Act comes into play as to rate changes only in (1) imposing upon the seller the procedural requirement of filing timely notice of change, (2) giving the Commission authority to review such changes, and (3) authorizing the Commission, in the case of rates for sales of gas • • • other than exclusively industrial • • • to suspend the new rates • • • pending

[16] All emphasis in this Petition supplied unless otherwise noted.

a determination of the lawfulness of the rates as changed." (p. 113)

It seems clear from *Mobile* that the Section 4(d) change is effected not by an approving order of the Commission, but by the action alone of the regulated company (p. 342), and when so "effected", like any other rate, can be set aside only upon being found unlawful in a Commission review (p. 342).

Finally, *Mobile* concluded upon this review of the provisions of Sections 4 and 5(a) that they "simply" defined and implemented Commission powers to review rates set by the natural gas companies "and there is nothing to indicate that they were intended to do more." (p. 343)

The holding below is squarely in conflict with this Court's decisions in *Mobile* and *Memphis*.

Sections 20 and 22 of the Act provide the Commission with ample power to enforce and compel filing. (App. 39a, 40a)

Additionally, § 1.6 (App. 41a-43a) of the Commission's "Rules of Practice and Procedure" furnished a ready prescription to the Commission, Brooklyn Union and Transco for a proceeding against Mobil to show cause why it should not file, and § 1.9(c) (App. 44a-45a) required a detailed answer under oath. Applicability of this specific section has been noted in a case of similar circumstances. *Interstate Natural Gas Co.* v. *Southern Cal. Gas Co.* (D.C.S.D. Cal. 1952) 103 F.S. 318, aff'd (9 Cir. 1953) 209 F. 2d 300, 385. Power to enforce filing by Mobil, if owed, was ample.

Nor was this power in any manner interfered with or emasculated by the stay order in *Magnolia*. That order did not purport to stay the Act or the Rules of Practice and Procedure against Mobil: it only stayed Order 174-A, a procedural regulation applicable only after filing.

The Fifth Circuit in *Magnolia* specified that if Commission jurisdiction existed there, it arose from the Act itself, not "by virtue" of Order 174-A (p. 791).

Indeed, contrasting the stay order against the inert nature which *Magnolia* ascribes to Orders 174 and 174-A, except upon contingency of future administrative action, which never occurred, that order stayed nothing.

Furthermore, the Court of Appeals use of "lawful" in connection with rates is equally mistaken. Section 4(a) provides:

> "All rates and charges made, demanded, or received by any natural-gas company for • • • sale of natural gas subject to the jurisdiction of the Commission • • • shall be just and reasonable, and any such rate • • • *that is not just and reasonable is hereby declared to unlawful.*"

This definition neither expressly, nor by inference, includes the concept of requirement of "filing". Nor does it give rise to a justiciable right. *Montana-Dakota Utilities Co.* v. *Northwestern Pub. Serv. Co.* (1950) 341 U. S. 246; *T. I. M. E., Inc.* v. *U. S.* (1959) 359 U. S. 464.

Section 4(b) expands and clarifies the Section 4(a) definition by prohibiting "undue preference" or "any unreasonable difference." The courts, in discharging their review functions, construe "just and reasonable" as a rate not so low as to jeopardize the regulated companies contemplated public service, and not so high as to penalize unjustly purchasers, all as measured by constitutional standards. *F. P. C.* v. *Hope Natural Gas Co.* (1944) 320 U. S. 591; *Montana-Dakota*, supra. Only Commission review can specify where stands the just and reasonable rate level. *Montana-Dakota.* This function Congress entrusted only to the Commission, not to the Courts. *Hope*,

supra, at page 617-8; *Montana-Dakota* at page 251-2. Thus the Act expressly declares that "lawfulness" and "justness and reasonableness" are precisely the same.

"Lawfulness" is a term of art under the Act and carries no gloss save that which derives from §§ 4(a) and 4(b). Petitioner respectfully suggests that the Court of Appeals was without warrant in holding that "lawfulness" depended upon filing, and that failure to file produced "unlawfulness."

The holding that filing was prerequisite to lawfulness and that unlawfulness was consequent upon failure to file is in conflict with the Ninth Circuit in *Interstate Nat. Gas Co.* supra, p. 384, and with its own decision in *Harrington.*

There, the Fifth Circuit said failure to file a contract which "should have been filed" did not prevent Commission jurisdiction from attaching. It noted that nothing in the Act or Commission orders indicated there was no effective or lawful rate until such time as the rates were filed. "To the contrary • • • the contract rate, even though unfiled, became and remained the only lawful rate until changed by order of the • • • Commission." (p. 919)

Correctly, in *Harrington*, it noted that neither the Commission "nor • • • any court possessed" power to look into the past to fix retroactively a "just, reasonable and lawful rate." This was so because the parties had fixed the rate to be charged "by their solemn and binding contract, and that contract rate could be changed only by the • • • Commission after a hearing • • • [under] • • • Section 5(a) • • •", citing Mobile. (p. 918-9)

Such an "intra-circuit" conflict has been held to call for review by this Court. *Dickinson* v. *Petroleum Conversion Corp.* (1950) 338 U. S. 508; *John Hancock Mut. Life Ins. Co.* v. *Bartels* (1939) 308 U. S. 180, 181.

The Ninth Circuit in *Interstate Natural Gas* was just as categorical (p. 384), as *Harrington*, relying upon the holding of this Court in *United States Nav. Co.* v. *Cunard S. S. Co.* (1932) 284 U. S. 474, 486, the logic of which it said was reaffirmed in *Far East Conference* v. *U. S.* (1952) 342 U. S. 570.

POINT II.

IN DECLARING THAT ORDER 174-A FIXES AND MAKES RATES, A POWER DENIED THE COMMISSION BY THE ACT, THE COURT BELOW HOLDS THAT THE COMMISSION MAY, BY REGULATION, LEGISLATIVELY CLOTHE ITSELF WITH SUCH DENIED POWER — A FEDERAL QUESTION OF IMPORTANCE WHICH THIS COURT HAS NOT SETTLED BUT SHOULD DETERMINE, AND WHICH HOLDING IS IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT.

The Court below fundamentally misconceived the Act in holding:

> "• • • the lawful rates established, by virtue of the Act and the Regulations of the Commission, [are] the contract rates of June 7, 1954." (App. 6a)

The Act denies any power to the Commission to fix or establish rates; it gives power only to review rates set and established by the regulated company. Petitioner submits that the Commission could not accomplish by Order 174-A, a mere regulation, what it was expressly denied power to do by the Basic Act. *Mobile* held that the Commission's power, defined by §§ 4(e) and 5(a) was to "set aside and modify" any rate which after hearing it found to be unjust and unreasonable. This it declared was neither "rate-making nor rate-changing" procedure but "simply the power to

review rates and contracts made * * * by natural gas companies" and to "remedy" them if found unlawful. (p. 341)

The power to make and change rates, *Mobile* observed, belongs to the regulated company, and was no different from such powers the regulated companies would possess in the absence of the Act, and when made or changed could only be set aside or modified if found unlawful by the Commission in a review of such rates. (p. 342-3)

Memphis established that where the *contract* reserved right to change, change was freely available to the regulated company, subject, of course, only to Commission review.

Here, the Mobil-Transco contract provided for changes, and, as in *Memphis*, stipulated how the changes were to be measured. These were the contract rates which the court below in disregard of the contract ordered paid back. They could not be unlawful; and there was no Section 5(a) hearing or order purporting to change, modify or set aside said contract — the only means by which the contract rates could be changed.

This disregard of contract is in direct conflict with *Mobile* and *Memphis*, as well as the Fifth Circuit's earlier decision in *Harrington*, which recognized and enforced the contract rate, as controlling, though unfiled with the Commission. Thus, the court below permitted Transco "unilaterally" to change and repudiate an agreed contract rate in the face of no contract invalidity. Equally it permitted Brooklyn Union, owning no contract privity, to set aside the contract and recover contrary to its terms.

Thus the contract rate is changed not by a Commission Order pursuant to Section 5(a) review, but by substitution of judicial dictate resulting from usurpation of powers granted solely to the Commission.

The holding furnishes yet another instance of intra-circuit conflict, in this instance with *Magnolia*.

By this intra-circuit conflict, Mobil falls between two stools: *Magnolia*, a 19(b) appeal, holds that Order 174-A is not self-executing, not adjudicatory, does not establish jurisdiction or rates, and is ineffective unless upon the contingency of future administrative orders, upon which the appeal was dismissed; whereas, here, the time long since having expired for a Section 19(b) appeal and review, the court below does an about face and holds that Order 174-A is an effective, self-executing adjudicatory order making and establishing rates. This conflict demands that this Court should assume jurisdiction and authoritatively determine the issue.

Congress in giving the Commission power by Section 16 of the Act to issue regulations, never intended or purported to authorize it by regulation to amend legislatively the basic act and thus confer upon itself powers expressly denied it by the basic act. Yet, as the meaning and effect of Orders 174 and 174-A are proclaimed by the court below, that is precisely what is accomplished.

In this holding the court below is in direct conflict with the Court of Appeals for the District of Columbia Circuit in *Willmut Gas & Oil Co*, v. *F. P. C.*, (1961) 294 F. 2d 245, cert. den. 368 U. S. 975; rehearing denied by this Court March 5, 1962. There the issue was whether the Commission's failure to adopt a regulation prohibiting a Section 4(d) filing prior to completion of review of a prior 4(d) filing constituted an abuse of discretion. In rejecting the Court said:

> "Section 16 of the Act speaks in broad and general terms: it provides, *inter alia*, that 'The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appro-

priate to carry out the provisions of this Act." But the broad power granted by this statutory language does not authorize an order, rule or regulation which would nullify or restrict the right of a natural gas company to change the rates under which it offers to furnish service, subject only to the requirement of Section 4(d) of the Act that it notify the Commission of the changes, so that it may proceed under Section 4(e). As the Supreme Court said in the Mobile opinion, 'The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act.' An order or regulation requiring the rejection of increased rates because earlier increases were still under investigation, which Willmut suggests, would deny to United the right to change rates at which it offers service, which the Mobile decision says is the right of a natural gas company. *Thus, it seems clear that such an order or regulation would amount to a legislative change which is beyond the authority of the Commission.*" (p. 250)

POINT III.

IN EXERCISING JURISDICTION AND POWER GIVEN BY THE NATURAL GAS ACT TO THE PRIMARY AND EXCLUSIVE JURISDICTION OF THE FEDERAL POWER COMMISSION, THE COURT BELOW HAS RENDERED A DECISION IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND DECISIONS OF ITS OWN AND OTHER CIRCUITS ON THE SAME PRINCIPLE.

The decision below is dangerous and requires correction at the hands of this Court, not only because it conflicts with applicable decisions of this Court as well as its own and other Circuits; but because, if allowed to stand, it would create by exception an area within which courts could move

to exercise the primary jurisdiction of the Commission and create conflicting and differing rules of decision varying from court to court which would produce chaos, confusion and uncertainity as to what rules govern and control.

The opinion below contains proof of these considerations: (1) the court could decide "merits" by "determining the lawful rates on June 7, 1954"; (2) this was not "fixing any just or reasonable rate or granting reparations" because "solely ancillary" to determining effect of the stay order and of Mobil's failure to file with the Commission as required by Section 4 and Orders 174 and 174-A; (3) the rates were "unlawful" because not filed with the Commission until long after collection; (4) the only lawful rates from June 7, 1954 until Mobil received approval from the Commission of different rates were fixed by Section 4 of the Act and Order 174-A as the rates of June 7, 1954, and no other rates could be collected; (5) the court below admitted lack of authority to so establish rates. The record reflected no Section 5(a) order by the Commission modifying Mobil's contract rates at any of the pertinent times involved.

It is fundamental that rate making is a legislative function, *Prentis* v. *Atlantic Coast Line Co.* (1908) 211 U. S. 210, 225, given exclusively to the Commission, in which the courts will not interfere, for their only function is the review provided by Section 19 (15 U. S. C. A. §717r), which is limited to keeping the Commission within the bounds which Congress has created. *Colorado Interstate Gas Co.* v. *F. P. C.* (1944) 324 U. S. 581, 589; *Montana-Dakota*, supra, p. 251; *Harrington*, supra, p. 918; *Mississippi Power & Light Co.* v. *Memphis Nat. Gas Co.* (5 Cir. 1947) 162 F. 2d 388, 390, cert. den. 332 U. S. 770; *Michigan Cons. Gas Co.* v. *Panhandle Eastern Pipe Line Co.* (6 Cir. 1949) 173 F.

2d 784; *Natural Gas Pipe Line Co.* v. *F. P. C.* (1944) 141 F. 2d 27; *McClellan* v. *Montana-Dakota Utilities Co.* (8 Cir., 1953) 204 F. 2d 166, 168, 169, cert. den. 346 U. S. 825.

Several basic reasons exist for this rule. There is the principle of primary administrative jurisdiction, for which the bell-wether case is *Texas & Pacific R. R.* v. *Abilene Cotton Oil Co.* (1907) 204 U.S. 426; see, too, *Interstate Nat. Gas Co.*, supra.

In *Montana-Dakota* (p. 250) this Court said that suit could not be instituted in a federal court to recover a portion of past rates on the ground of unreasonableness, for plaintiff would be out of court for failure to exhaust administrative remedies, because at any time in the past it could have applied to the administrative agency for review. Further, this Court said that the right to a reasonable rate was that which the Commission set and the courts were without power to authorize commerce in the commodity on other terms. (p. 251)

We have demonstrated above that failure to file in no wise deprived the Commission of jurisdiction. *Interstate Natural Gas Co., supra*, citing *U. S. Navigation v. Cunard, supra*, and *Far East Conference, supra*, pointed out that primary jurisdiction could not be avoided by the expedient of refusing to file, for the Commission was "fully empowered by §717m(a), 717d(a) and 717s, 15 U.S.C.A., to afford relief upon its own motion or upon complaint." (p. 384)

The Commission's own Rules of Practice prescribed ample administrative remedy if contract rates were questioned (see *infra* p. 14). These Rules of Practice were not a part of Order 174 or Order 174-A and were wholly outside the pale of the stay order.

Finally, *Texas Pacific* v. *Abilene Cotton Oil Co., supra*, noted that judicial action invasive of administrative pri-

mary jurisdiction would not only destroy the administrative act but would lead to chaotic confusion, because "* * * unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question." (p. 440)

The excuse of "solely ancillary" for determining effect of the stay order seems unpersuasive. In simple, direct terms, that order stays Order 174-A; a procedural rule. Pursuit of "effect" does not turn upon collateral exercise by the Court of the Commission's primary jurisdiction. The Commission's jurisdiction arose by the Act; not the stay order; not Order 174 or 174-A. If exercise of the forbidden power was the genesis of such order, the order would be as void as the exercise of such forbidden power.

Jurisdiction asserted was diversity and the Natural Gas Act (R. 31). Both by answer (R. 283) and Motion for Summary Judgment (R. 462) Mobil assailed jurisdiction.

Thus both courts below were confronted by the same dilemma which this Court discussed in *Montana-Dakota*, supra. Brooklyn Union showed diversity, but no common-law right. The complaint, relying generally on the Act, clearly was an effort to recover the difference between an alleged lawful or just and reasonable price and the price charged alleged to be unlawful. This is simple reparations — a power not only denied the Commission, but the courts.

Nor was jurisdiction created or rescued by Brooklyn Union's specious claim of a Transco assignment. (R. 659-60; App. 20a). Transco had no cause of action to assign. It made no effort to assign. It was absolutely bound by its

valid contract, subject only to modification by the Commission under Section 5(a) of the Act, which never occurred. *Mobile, supra.*

Furthermore, the common law cause which had existed prior to the passage of the Act was by that Act abrogated and superseded so that no such cause of action existed. The complaint stated no cause cognizable by federal courts. *Montana-Dakota, supra; United Gas Pipe Line Co.* v. *Willmut Oil & Gas Co.* (S. Ct. Miss., 1957) 97 So. 2d 530, cert. den. 357 U. S. 937; *Garner* v. *Teamsters & H. Union* (1953) 346 U. S. 485; *Watab Paper Co.* v. *Northern Pac. Ry.* (8 Cir. 1946) 154 F. 2d 436, 438; *Glassberg* v. *Boyd* (Del. Ch. 1955) 116 A. 2d 711, 716-7.

The court below ignored and is in direct conflict with these applicable decisions. This Court, in *Montana-Dakota*, declared that courts in determining allegations of fraud and deceit could neither originally nor by reference execute the power and jurisdiction given to the administrative agency.

The Sixth Circuit in *Michigan Consolidated, supra*, squarely held such powers could not be exercised for purposes of determining right to specific performance.

The Ninth Circuit in *Interstate Nat. Gas Co., supra*, affirmed a strong opinion by the District Court (102 F. S. 685) and held that primary jurisdiction forbade judicial determination of lawfulness with respect to claims of anti-trust.

The Eighth Circuit in *McClellan* v. *Montana-Dakota, supra*, affirming 104 F. S. 46, held a suit for damages for the difference between alleged unreasonable rates and just rates in the past could not be maintained in connection with the claimed anti-trust violation, and followed

the District Court opinion in *Interstate Nat. Gas Co., supra.*

As pointed out above, the court below is in conflict with itself in *Harrington,* wherein it held that it could not exercise the prerogatives of the Commission in connection with the determination of lawfulness of rates.

But the disregard of applicable decisions is compounded. The court below notes (App. 4a) that Mobil filed nothing with the Commission until long after the pertinent dates involved in this cause. The Commission's rate review power is prospective only. Sec. 5(a). *F. P. C. v. Hope Natural Gas Co.* (1944) 320 U. S. 591, 618. The dates involved were between 1955 and 1957, and were thus for past periods. It is no longer open to question that the Act does not give the Commission power to award reparations, nor to determine lawfulness of past rates; while courts are denied independent power thereabout. *F. P. C. v. Hope, supra,* p. 618; *Montana-Dakota, supra,* p. 254; *State Corporation Commission of Kansas v. F. P. C.* (8 Cir. 1954) 215 F. 2d 183, 194; *Harrington, supra,* p. 918; *United Gas Pipe Line Company v. Willmut Oil & Gas Company, supra.*

The conflict in which the court below finds itself between the instant decision and that in *Harrington,* is made more dramatic by its reversal in this Court's opinion in *T. I. M. E., supra,* p. 469-70. In *T. I. M. E.* this Court reaffirmed its holdings in *Montana-Dakota* that the statutory language which entrusts rate regulation to the administrative agency creates only a "'criterion for administrative application in determining a lawful rate', rather than a 'justiciable legal right'"; and that the statutory declaration that unreasonable rates are "unlawful", does not create a cause of action for the recovery of allegedly un-

reasonable past rates, finally declaring that a study of the Motor Carrier Act there involved led this Court "to the conclusion that here, as in the Federal Power Act, Congress did not intend to give shippers a statutory cause of action for the recovery of allegedly unreasonable past rates, or to enable them to assert 'unreasonable' as a defense in carrier suits to recover applicable tariff rates." (p. 470).

The Act here contains similar language, yet this suit is one wherein Brooklyn Union and Transco seek to recover under the statute for allegedly unreasonable past rates, the granting of which by the court below required it to, as it did, determine both lawfulness and unlawfulness of matters entrusted to the Commission.

T. I. M. E. also reaffirmed the declaration of *Texas & Pacific* v. *Abilene Cotton Oil Co.* that the congressional delegation to the administrative agency of power to determine rates necessarily extinguished as "'absolutely inconsistent' with the recognition of the Commission's primary jurisdiction" any common law right, and declared that a court "must decline to consider a defense [or complaint, as here] which 'involves only issues which a federal court cannot decide and can only refer to a body which also would have no independent jurisdiction to decide . . .'" (p. 473, 475).

Petitioner comes back, then, to the pronouncement of *Montana-Dakota*, particularly apropos here: "But the prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce." (p. 251)

CONCLUSION

The matters discussed above are believed to involve novel questions of construction and interpretation of the

Natural Gas Act and the powers of the Commission and the courts thereabout, as well as questions of Federal law which individually are of such importance to the future administration and application of the Act that they should be settled by this Court. Petitioner submits that the decision below invades the statutory province reserved exclusively to the discretion and expertise of the Commission, and substitutes for the administrative discretion and judgment, the judgment of the court, which, indeed, is contrary to applicable decisions with which it is in conflict, as well as decisions of its own, all of which make it appropriate for this Court to assume jurisdiction and make appropriate determinations thereon.

It is accordingly prayed that the Writ of Certiorari to review the judgment of the court below be granted.

Respectfully submitted,

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